SEE TEOW CHUAN & ANOR A

v.

DATO' ANTHONY SEE TEOW GUAN

COURT OF APPEAL, PUTRAJAYA B
ABDUL KADIR SULAIMAN JCA
TENGKU BAHARUDIN SHAH JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO. W-02-345-1999]
24 MARCH 2006 C

EVIDENCE: *Privilege - Legal professional privilege - Admissibility of legal opinion - Solicitor and client privilege - Evidence Act 1950, s. 126*

CIVIL PROCEDURE: *Appeals - Decision of trial judge - Whether appealable - Jurisdiction of Court of Appeal - Courts of Judicature Act 1964, s. 67* D

The plaintiffs and defendant were brothers and shareholders cum directors of Kian Joo Holdings Sdn Bhd ("the company"). The company owned 37% of the issued and fully paid shares in Kian Joo Can Factory Berhad ("KJCF") which is a public listed company. The first plaintiff is the managing director of KJCF, the second plaintiff is the executive director and factory manager of KJCF, and the defendant is the director and general manager of KJCF. The defendant and one Alice See ("AS") met up with a lawyer in Shearn Delamore & Co ("solicitor") and made some very serious allegations against the plaintiffs about their operations in K.L. Metal Printing (M) Sdn Bhd ("KLMP"). Based on the instructions and information given, the solicitor provided a legal opinion which said legal opinion was subsequently published to various persons and given to the external auditors of KJFC. The plaintiffs instituted defamation proceedings for libel and slander against the defendant. At the trial of this action, the plaintiffs called the solicitor and in the course of examining the solicitor, the plaintiffs through their solicitors sought to admit the legal opinion which was objected to by the solicitor as well as the defendant's solicitors by invoking s. 126 of the Evidence Act 1950 ("EA"). The trial judge ordered a trial within a trial to determine the admissibility of the legal opinion and at the conclusion thereof, held that the legal opinion could not be produced on the ground of solicitor and client privilege. The plaintiffs appealed against this E F G H I

A decision and the parties by consent agreed to adjourn the trial pending the outcome of the plaintiffs' appeal to the Court of Appeal.

The issues that rose for determination *vide* this appeal were: (1) B whether the decision of the learned trial judge is appealable under s. 67 of the Courts of Judicature Act 1964 ("CJA"); and (2) whether the legal opinion of the solicitor was admissible in evidence or protected by legal profession privilege under s. 126 of the EA.

C **Held (allowing the appellants' appeal with costs and setting aside the decision of the learned trial judge)**
Per Abdul Kadir Sulaiman JCA:

(1) The Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or D matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order is not to be restricted to the meaning given to the word 'decision' in the current version of s. 3 CJA because in s. 67 CJA, civil appeals to the Court of Appeal are from 'any E judgment or order' of any High Court whereas, in criminal appeals, they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. F It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature – *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377. This court had the jurisdiction to hear and determine this G appeal. Furthermore, the decision of the learned trial judge in not allowing the production of the legal opinion had in fact destroyed the substratum of the plaintiffs' claim which is founded on legal opinion. (paras 20 & 21)

H **(2)** The facts of the case clearly demonstrate that the communications between the defendant and the solicitor was not intended to be confidential. In all the circumstances of the case and for the grounds given in this judgment we hold that the defendant had waived the confidentiality and the privilege I attached to the legal opinion. The decision of the learned trial judge was plainly wrong and was a serious misdirection that warrants our appellate interference. (para 68).

Bahasa Malaysia *translation of headnotes*

Plaintif dan defendan merupakan adik beradik dan pemegang syer dan pengarah di dalam Kian Joo Holdings Sdn Bhd ("syarikat"). Syarikat tersebut memiliki 37% syer terbit dan terbayar dalam Kian Joo Can Factory Berhad ("KJCF") yang merupakan sebuah syarikat tersenarai awam (public listed). Plaintif pertama merupakan pengarah urusan KJCF, plaintif kedua merupakan pengarah eksekutif dan pengurus kilang KJCF dan defendan merupakan pengarah dan pengurus am KJCF. Defendan dengan Cik Alice See ("AS") telahpun berjumpa dengan seorang peguam daripada Tetuan Shearn Delamore & Co ("peguam") dan membuat tuduhan yang serius terhadap plaintif berkaitan dengan operasi mereka di K.L. Metal Printing (M) Sdn Bhd ("KLMP"). Berdasarkan arahan dan maklumat yang diberikan, peguam tersebut telahpun menyediakan satu pendapat undang-undang yang mana pendapat undang-undang tersebut telahpun disebarkan dan atau diterbitkan kepada beberapa individu dan telah diberikan kepada juruaudit luar KJFC. Plaintif telah memulakan tindakan fitnah untuk libel dan slander terhadap defendan. Pada pendengaran tindakan ini, plaintif telah memanggil peguam tersebut dan dalam memeriksa peguam tersebut, plaintif melalui peguam mereka telah cuba untuk membenarkan masuk pendapat undang-undang tersebut dalam keterangan yang mana telah dibangkang oleh peguam tersebut dan juga peguam defendan di bawah s. 126 Akta Keterangan 1950 ("AK"). Hakim di peringkat itu telah memutuskan suatu perbicaraan dalam perbicaraan harus dijalankan untuk mengenalpasti sama ada pendapat undang-undang itu dapat dibenarkan masuk dalam keterangan dan pada pengakhiran perbicaraan dalam perbicaraan tersebut telah memutuskan bahawa pendapat undang-undang tersebut tidak boleh dimasukkan sebagai keterangan atas dasar komunikasi terlindung peguam anakguam. Plaintif telah merayu terhadap keputusan tersebut dan parti-parti telah bersetuju untuk menangguhkan pendengaran sementara menunggu keputusan rayuan plaintif ke Mahkamah Rayuan.

Isu-isu yang dibangkitkan melalui rayuan ini adalah: (1) Sama ada rayuan boleh dibuat terhadap keputusan yang arif hakim di bawah s. 67 Akta Kehakiman Mahkamah 1964 ("AKM"); dan (2) Sama ada pendapat undang-undang peguam tersebut dapat dimasukkan sebagai keterangan atau dilindungi atas dasar komunikasi terlindung peguam anakguam di bawah s. 126 AK.

Diputuskan (rayuan perayu dibenarkan dengan kos dan keputusan yang arif hakim diketepikan)
Oleh Abdul Kadir Sulaiman HMR:

(1) Mahkamah Rayuan mempunyai bidangkuasa untuk mendengar rayuan 'daripada mana-mana penghakiman atau perintah di Mahkamah Tinggi di dalam sebarang kausa tindakan sivil, sama ada dibuat dalam bidangkuasa asal atau rayuan'. Phrasa 'daripada mana-mana penghakiman atau perintah tidak harus terhad kepada makna yang diberikan kepada perkataan 'keputusan' dalam versi s. 3 AKM terkini kerana di dalam s. 67 AKM, rayuan sivil kepada mahkamah rayuan adalah daripada 'sebarang penghakiman atau perintah' di mahkamah tinggi sementara di dalam rayuan jenayah, ianya adalah terhadap 'sebarang keputusan' mahkamah tinggi. Tiada sebab yang memaksa untuk melanjutkan maksud perkataan 'mana-mana penghakiman atau perintah' untuk bermakna suatu penghakiman atau perintah yang akan memutuskan hak parti-parti secara mutlak. Fungsi mahkamah undang-undang bukanlah untuk meletakkan perkataan yang tidak wujud kepada peruntukkan-peruntukkan statutori kerana berbuat demikian merupakan suatu gangguan dalam badan perundangan – *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377. Mahkamah ini mempunyai bidangkuasa untuk memutuskan rayuan ini. Selanjutnya, keputusan yang arif hakim yang tidak membenarkan pendapat undang-undang tersebut diterima masuk sebagai keterangan telah memusnahkan substratum tuntutan plaintif yang berasaskan pendapat undang-undang tersebut.

(2) Fakta kes secara nyata menunjukkan bahawa komunikasi antara defendan dan peguam tidak bertujuan menjadi sulit. Dalam semua keadaan kes dan atas sebab-sebab yang dinyatakan di dalam ini, kami memutuskan bahawa defendan telah mengetepikan haknya kepada pendapat undang-undang tersebut sebagai sulit dan terlindung. Keputusan yang arif hakim secara jelas adalah salah dan merupakan suatu kesalahan arah yang serius yang memerlukan campur tangan mahkamah rayuan ini.

Case(s) referred to:

Asmore v. Corp of Lloyds [1992] 2 All ER 480 ***(refd)***
Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1989] 3 MLJ 445 ***(refd)***
Daya Shankar Dubey v. Subhas Kumar [1992] Cri LJ 319 ***(refd)***
Derby & Co Ltd & Ors v. Weldon & Ors (No 10) [1991] 2 All ER 908 ***(refd)***
DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd [2002] 2 CLJ 57 FC ***(refd)***
Emperor v. Mariane G Rodrigues [1903] 5 Bombay Law Reporter 122 ***(refd)***
Jaafar Shaari v. Tan Lip Eng [1997] 4 CLJ 509 SC ***(refd)***
Minter (Pauper) v. Priest [1930] AC 558 ***(refd)***
Ritz Hotel Ltd v. Charles of The Ritz Ltd (No 22) [1988] 14 NSWLR 132 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 CA ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 67(i)
Evidence Act 1950, ss. 126, 128, 129
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 24 r. 5(1), O. 27 r. 4

Evidence Act 1872 [Ind], s. 126

Other source(s) referred to:

CD Field's Law of Evidence, 11th edn, vol 5, pp 4613, 4614, 4615
Dr Ronald J Desiatnik, *Legal Profession Privilege in Australia,* pp 22, 102, 103
English Supreme Court Practice 1999 edn, p 454, para 24/5/2

For the appellants - V Sithambaram; M/s VK Lingam & Co
For the respondents - Romesh Abraham; M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-23-106-1997]

Reported by Sharmini Pillai

JUDGMENT

Abdul Kadir Sulaiman JCA:

[1] The appellant's appeal is against the decision of the learned judge who ordered that the communications between the respondent and the solicitor and the consequent written legal opinion were not admissible in evidence at the trial below.

[2] When this appeal came before us, counsels for both the appellants and the respondent had by consent requested the court that they make written submission to us. We acceded to their request and adjourned our decision to a date to be fixed. We have thoroughly scrutinised the entire appeal record and considered the written submissions and authorities submitted to us. We now deliver our judgment in this appeal.

[3] We now state the background facts of this appeal. The appellants in this appeal are See Teow Chuan and See Teow Khoon. We will in this judgment refer to them as the plaintiffs. The respondent is Dato' Anthony See Teow Guan and we will refer to him as the defendant. The plaintiffs and the defendant are brothers.

[4] The plaintiffs and the defendant are shareholders cum directors of Kian Joo Holdings Sdn Bhd ("the company"). The company is the owner of about 37% of the issued and fully paid shares in Kian Joo Can Factory Berhad ("KJCF"). KJCF is a company listed on the main board of the Kuala Lumpur Stock Exchange.

[5] The first plaintiff is the managing director of KJCF whilst the second plaintiff is the executive director and factory manager of KJCF. The defendant is the executive director and general manager of KJCF. The first plaintiff joined KJCF in 1960 and became managing director in 1965.

[6] There was litigation between the plaintiffs and the defendant. On 10 September 1994 the defendant together with 10 other petitioners instituted a petition *vide* Kuala Lumpur High Court Companies (Winding-up) No. D4-28-294-94 to wind up the company. Subsequently by consent of the parties, the High Court ordered the company to be wound up and liquidators were appointed. The liquidators of the company filed in court an application for directions for the sale of the company's 37% shareholding in KJCF. The defendant and 10 other petitioners opposed the proposed sale of the shares by the liquidators and sought a distribution in specie of the shares. However the plaintiffs supported the liquidators application for the sale of the shares. The litigation of the winding up proceedings was dealt by this court in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598.

[7] On 28 October 1996 the defendant and Ms Alice See, the financial controller of KJCF ("Alice") who were both petitioners to wind up the company met Ms Jeyanthini Kannaparen, then a senior legal assistant in the law firm of Shearn Delamore & Co. She is now a partner in the law firm. We will in this judgment refer to Ms Jeyanthi Kannaparen as the solicitor.

[8] The defendant and Alice had given instructions and furnished information to the solicitor about the plaintiffs operating a company known as K.L Metal Printing (M) Sdn Bhd ("KLMP"). They made very serious allegations against the plaintiffs.

[9] Based on the instructions and information provided by the defendant and Alice, the solicitor rendered a legal opinion dated 14 November 1996 from the law firm of Shearn Delamore & Co. We will refer to this legal opinion as the legal opinion. The legal opinion was given to the defendant and the defendant subsequently published the legal opinion to various persons. The plaintiffs were also given a copy of the legal opinion by the external auditors of KJCF.

[10] The plaintiffs took serious umbrage to the defamatory statements contained in the legal opinion and the resultant publication to various persons. On 29 January 1997 the plaintiffs solicitors issued to the defendant a letter of demand for defamation. The defendant replied on 4 February 1997 denying liability for defamation. On 6 February 1997 the plaintiffs instituted defamation proceedings for slander and libel against the defendant to vindicate their reputation.

[11] At the trial of this action, the plaintiffs called the solicitor (PW1) who gave the legal opinion, as the first witness. In the course of the examination of the solicitor the plaintiffs through its solicitors sought to admit the legal opinion. The solicitor and the defendant's counsel objected to the production of the legal opinion and invoked s. 126 of the Evidence Act. The trial judge then ordered a trial within a trial to determine the admissibility of the legal opinion. Upon conclusion of the trial within a trial, the learned judge held that the solicitor cannot be compelled to disclose the communications she had with the defendant and that the legal opinion could not be produced on the ground of solicitor and client privilege. The judgment of the High Court is reported in [1994] 4 MLJ 42.

[12] In the upshot of the judge's decision, the parties had by consent adjourned the trial pending the outcome of the plaintiffs appeal to the Court of Appeal. Hence this appeal by the plaintiffs.

The Legal Opinion

[13] The legal opinion formed the foundation and substratum of the plaintiffs defamation proceedings against the defendant. The legal opinion was pleaded in full in para. 10 of the statement of claim as follows:

Shearn & Delamore & Co

To: Kian Joo Can Factory Bhd

For: Dato' Anthony T G See

From: Ms Jeyanthini Our Ref: 1816289/JK

Total No. of page: 3 Date: 14.11.96

(Including this page)

Dear Sir

KL Metal Printing (M) Sdn Bhd

We have been asked to advise on the options available to Kian Joo Can Factory Bhd (hereafter KJCF) in dealing with Mr See Teow Chuan and Mr See Teow Koon.

We understand the position to be that Mr See Teow Chuan, a Managing Director in KJCF and Mr See Teow Koon, an Executive Director in KJCF have for some years now been operating a company known as K.L. Metal Printing (M) Sdn Bhd (hereafter KLMP) from within KJCF's premises.

The Directors are said to have used KLMP as a vehicle to siphon substantial sums of money from KJCF by way of sale of cans from KJCF to KLMP at a loss to KJCF, raising fictitious invoices in favour of KLMP for work done/cans supplied by KJCF, etc.

We have not had sight of any reports on investigations into the matter or an Auditors report and have been asked to provide our advice on the steps that KJCF's Board should take.

i) Action against Mr See Teow Chuan and Mr See Teow Koon

Both these Directors owe a fiduciary duty and duty of care to KJCF. By incorporating KLMP and using the entity to siphon monies out from KJCF both the Directors have clearly breached both the fiduciary duty and duty of care they owe KJCF. A civil action can be brought against both Directors for damages sustained by KJCF by reason of such breaches.

Obviously both the Directors ought also to be removed from the Board.

The removal of these Directors will, pursuant to Article 109 of KJCF's Memorandum and Articles of Associates have to be by ordinary resolution of the shareholders of KJCF.

We understand that there may be no need for a removal of the Directors and that the Directors are expected to voluntarily resign and also reimburse KJCF for all loss and damage sustained.

ii) Protecting the interests of the shareholders and the rest of the Broad.

The remaining members of the Board do themselves owe a fiduciary duty and duty of care to the shareholders to prevent the two errant Directors from abusing their position of authority in KJCF.

To that and as KJCF is a public listed company. We understand your concern in protecting the remainder of the Board and the shareholders.

In the event both the Directors resign voluntarily and reimburse KJCF with all monies wrongfully received, there will be a no loss position and we do not see the necessity for police reports etc.

However in the event the Directors are not cooperative, they can only be removed by the members at a General Meeting and it is then likely that a police report will at least show the members that rest of the Board have not condoned the errant Directors' action.

Once a police report is lodged it is entirely the prerogative of the Police to prosecute a criminal action against the Directors.

The penalties for such criminal action will be pursuant to the Criminal Procedure Code and do not provide restitution for the losses sustained by KJCF.

iii) Action against KLMP

An action may also be commenced against KLMP by KJCF for recovery of monies had and received.

The basis of this action will be that the monies paid to KLMP were paid under a mistake of fact by KJCF (ie as to the authenticity of the claims) or that no consideration passed from KLMP to KJCF for these monies.

Any judgment that may be entered against KLMP can only be enforced as against the assets and property of KLMP. We have no instructions on what assets and property KLMP owns and cannot therefore advise if such action is viable.

A We trust we have been of some assistance and ask that you will revert to our Ms Jeyanthini with your further queries.

[14] The legal opinion is also found at pp. 705 to 707 of the Appeal Record. The plaintiffs had averred that the said words complained of were defamatory of the plaintiffs and in their natural B and ordinary meaning meant that the plaintiffs and each of them had dishonestly and in breach of their duties as directors of KLCF used KLMP as a vehicle to siphon sums of money away from KJCF and, in particular, by the raising of fictitious invoices. The C plaintiffs claimed that by reason of the said publication they have suffered damage to their character and reputation and have been brought into public scandal, odium and contempt. The plaintiffs claimed damages for libel and slander and an injunction against the defendant to prevent further publication of the said or similar D defamatory words. (at paras. 10, 11 12 and 13 of the statement of claim).

[15] The defendant entered his defence on 14 March 1997. The defendant pleaded that the instructions, statements and information given by the defendant to the solicitor was an E occasion of qualified privilege. The defendant claimed that the subject matter of the legal opinion and the giving of instructions by the defendant to the solicitor constituted a matter of legal privilege between solicitor and client and cannot be the subject of legal proceedings or actionable in law.

F

[16] The defendant also pleaded the substantive defence of justification and entered particulars to support the justification. The defendant first denied publication of the legal opinion to other persons identified in the statement of claim. Further or alternatively G the defendant contended that his publication of the legal opinion to other persons was on an occasion of qualified privilege. (paras 7 to 9 and 13 to 18 of the defence)

[17] The plaintiffs filed their reply on 14 April 1997. In short the H plaintiffs denied the allegations of dishonesty and breach of fiduciary duties alleged by the defendant. The plaintiffs denied that the defendant was legally or validly instructed to seek on behalf of KJCF a legal opinion from Shearn Delamore & Co in relation to the KLMP matter and of and concerning the plaintiffs. There I was no decision by the KJCF Audit Committee or the KJCF Board to seek any such legal opinion.

[18] The plaintiffs claimed that the defendant was actuated by malice when he gave the instructions and information to the solicitor and sought the legal opinion and subsequently caused its publication. Particulars of malice and express malice were pleaded. The plaintiff claimed that at all material times the defendant knew that for over 20 years there was a legitimate commercial relationship, on an arms length basis between KLMP and KJCF. The defendant had sought and published the legal opinion in order to remove the plaintiffs from the Board of KJCF and its subsidiary and associated companies. (at paras. 5.1 to 6.2 and 7 to 13 of the reply).

Is The Decision Appealable

[19] Before we deal with the appeal proper we will deal with the issue as to whether the decision of the learned judge is in fact appealable under s. 67 of the Courts of Judicature Act 1964. The parties while confirming that the trial was adjourned by consent of the parties had nevertheless invited this court to consider this issue.

[20] The plaintiffs appeal arises under s. 67(1) of the Courts of Judicature Act. We note that the word "decision" does not appear in s. 67 of the Courts of Judicature Act and therefore the meaning assigned to it in s. 3 of the same Act has no application to s. 67. This court had held in *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377 at p. 382 as follows:

> Unlike '*Anwar*'s case, the instant appeal is a civil appeal in which s. 67(1) of the Courts of Judicature Act 1964 applies. Section 67(1) of the Act reads:
>
> > The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. (emphasis added.)
>
> It is to be noted that the word 'decision' is not used in s. 67(1), so that, there is no compelling reason to refer to s. 3 of the Act for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate

A jurisdiction'. The phrase 'from any judgment or order is not to be restricted to the meaning given to the word 'decision' in the current version of s. 3. This is because, in s. 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are
B against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain
C of the legislature.

In our judgment we hold, therefore, that the objection to the jurisdiction of this court to hear and determine this appeal is misconceived and misplaced. This court has the jurisdiction to hear and determine any appeal from the High Court in a civil
D cause or matter.

[21] We adopt the above passage cited by the Court of Appeal and accordingly hold that we have jurisdiction to hear and determine this appeal. We further hold that the decision of the
E learned judge in not allowing the production of the legal opinion had in fact destroyed the substratum of the plaintiffs claim which is founded on the legal opinion. In the upshot of the judge's decision there was nothing left for the plaintiffs to proceed with. Hence the judge's decision had in effect finally disposed of the
F rights of the parties.

Section 126 Of Evidence Act 1950

[22] We now deal with s. 126 of the Evidence Act 1950 which is the premise upon which the trial judge made the decision that
G the communications between the defendant and the solicitor and the legal opinion were not admissible in evidence as they were protected by legal profession privilege under s. 126.

[23] Section 126 of the Evidence Act states as follows:

H **Professional communications**

(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment
I as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by

him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure:

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

[24] In this respect ss. 128 to 129 of the same Act are also relevant.

[25] We are mindful that in interpreting s. 126 of the Act we are required to give a purposive approach and a construction that would promote the purpose or object underlying the Act. (See s. 17A of the Interpretation Acts 1948 & 1967 and the judgment of the Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd* [2002] 2 CLJ 57.

[26] The defendant submitted that s. 126 of the Act provides an evidential bar against the disclosure of matters coming within its scope and that communications coming within the scope of legal professional privilege are, in law, doubly guarded. In support of this submission the defendant relied on the decision of the House of Lords in *Minter (Pauper) v. Priest* [1930] AC 558 at 579, 580 and 581 where it was held:

My Lords, *confidential communications* passing between solicitor and client are doubly guarded in the law. It is important to emphasize the twofold nature of the protection given; for they are commonly said to be privileged and the word unfortunately tends to confuse two entirely distinct rights.

In the first place they are protected from disclosure whether by production of documents or in oral evidence. This protection is part of the law of evidence. It has no direct relation to the question whether the communication itself constitutes a cause of action; Neither the solicitor nor the client need be party to the action in which the question of evidence arises. Also it matters

A not whether the action be for defamation, fraud (subject to limitations to be discussed), breach of trust, breach of contract or otherwise; if the communication comes within the prescribed rule it is inadmissible in evidence. The object is no doubt to enable the, persons concerned to communicate freely without fear of exposing themselves or others to actions. But the right to have such communications so protected is the right of the client only. In this sense it is a "privilege," the privilege of the client. *If the client chooses to withdraw the veil, the law interposes no further difficulty. The communications are then available as evidence.*

C Once the communications have been admitted in evidence the second protection comes into force. This affects the question how far the communications can form part of a cause of action. They have become evidential: are they actionable? The protection here is limited. As far as I know it is confined to actions of defamation. I am not aware of any authority which would prevent a client from revealing communications made to him by his solicitor for the purpose of bringing an action of fraud, breach of trust, or negligence against him: just as the communications may if disclosed by the client be used as evidence in any actions by or against a third party.

E …

The main question in this case is whether the words complained of were confidential communications between solicitor and client so as to be entitled to the twofold protection I have mentioned…

F **… Not all communications therefore passing between solicitor and client are protected.** (emphasis added)

[27] The plaintiffs submitted that the privilege in s. 126 extends only to communications that are made to the solicitor in G confidence. Once the confidential communications contained in the legal opinion is published by the defendant to various persons and third parties, the defendant cannot claim privilege since by disclosing the legal opinion to third parties, the defendant had waived the privilege attached to it.

H **[28]** The plaintiffs cited *C.D Field's Law of Evidence* 11th edn, vol. 5 at pp. 4613, 4614 and 4615 in commenting on s. 126 of Indian Evidence Act which had clearly stated as follows:

I To what communications does the privilege extend. – The privilege extends only to communications made to an attorney confidentially and with a view to obtaining professional advice. It is well settled that the privilege protects only such communications

> as are made to the legal adviser in confidence, in the course and for the purpose of his employment. It is true that the section does not say in express words that the communication should be made in confidence. But as pointed out in *Memon Hajee Haroon Mohammad v. Molvi Abdul Karim*, the word "disclose" shows that the privileged communication must be confidential or private ...
>
> ... A communication to an attorney to be privileged must be of a confidential or private nature ...
>
> ... Section 126 has no application where the statement made by a client to his solicitor is made, not as confidential but for the purposes of communication.

[29] In *Ritz Hotel Ltd v. Charles of The Ritz Ltd (No. 22)* [1988] 14 NSWLR 132 at 133 Mc Lelland J held that:

> It seems to me to be an essential element in a claim for legal professional privilege that the material, disclosure of which is sought to be precluded is, so far as the person from whom disclosure is sought is concerned, confidential.

[30] The plaintiffs argued that the finding of the judge that there is no express requirement of confidentiality in s. 126 was fundamentally flawed. They submitted that the further finding by the judge that even if there was a requirement of confidentiality "the evidence point to great confidentiality and the need of secrecy according to the facts as exposed" clearly goes against the weight of evidence in this case. The very fact that the defendant had published the legal opinion to third parties clearly demonstrated that there was no confidentiality and secrecy and therefore the privilege was waived.

[31] We will now examine whether the element of confidentiality is required in legal profession privilege in s. 126. In *Emperor v. Mariane G Rodrigues* [1903] 5 Bombay Law Reporter 122 at p. 123 the court held that s. 126 of Evidence Act 1872, has no application where the statement made by the client to his solicitor is not made as confidential but for the purposes of communication. At p. 123 the court held as follows:

> The ground upon which the conviction of the appellant is complained of as illegal is that the statements having been made to the solicitor by the appellant as the solicitor's client were privileged under section 126 of the Evidence Act and that they could not be made the subject of a criminal charge. *Section 126 of the Evidence Act, however, can have no application where the statement made by a client to his solicitor was made not as confidential but for the*

A *purposes of communication.* Here the statements complained of as defamatory were obviously made not under the condition of secrecy and as a matter of fact they were communicated to the complainant by the solicitor because the solicitor had instructions to make them to the complainant. *There was, therefore, nothing of*
B *the character of confidential communications in them to bring them within the rule in section 126 of the Evidence Act.* (emphasis added)

[32] In our judgment it is settled law that where the communications with the solicitor is not intended to be confidential, the privilege under s. 126 of the Act will not apply. This is clearly
C established in *Emperor v. Mariane G Rodrigues* cited above which deals with s. 126 of Evidence Act 1872 of India which is *pari materia* with s. 126 of our Act.

[33] We therefore hold that it is settled law that the element of
D confidentiality is an essential requirement in s. 126.

[34] We will now examine the further facts and evidence of this case to ascertain whether the communications by the defendant to the solicitor were intended to be confidential. For this purpose we
E have carefully scrutinised the entire body of evidence in the appeal record.

[35] The defendant (PW7) testified at the trial within the trial. He said that he was instructed by YAM Tunku Nadzaruddin who is the chairman of KJCF ("Tunku") to get a legal opinion relating to
F the allegations against the plaintiffs involvement in the operations of KLMP. Tunku was then the non-executive chairman of KJCF. The defendant met with the external auditor of KJCF, Alice and Tunku at the Wisma Antah office on 22 October 1996. The office of KJCF was in Batu Caves. KJCF had no registered office at
G Wisma Antah. There was no official notice of this meeting. It was not an official meeting. No minutes were recorded of this meeting. The defendant testified that this meeting was not an official KJCF Board Meeting and neither was it a meeting of the KJCF Audit Committee. The defendant was a member of the KJCF Board. He
H was not a member of the KJCF Audit Committee. The members of the KJCF Audit Committee were not informed of this meeting. He did not obtain any board resolution authorising him to instruct the solicitor and obtain the legal opinion.

I **[36]** He said that when he went with Alice to seek and obtain the legal opinion from the solicitor, he knew that the legal opinion would be circulated to Yap Seng Chong ("Yap"), Mr Chew Kong

Seng ("Chew"), the Board members of KJCF which included the plaintiffs and the KJCF Audit Committee. He consulted the solicitor in his capacity as executive director of KJCF and Alice came along as group financial controller of KJCF. (pp. 305, 306 and 307 of Appeal Record). Alice is not a member of the KJCF Board or the KJCF Audit Committee.

[37] The defendant and Alice met the solicitor at the office of the law firm on 28 October 1996. At this meeting the defendant and Alice gave the instructions and made the statements to the solicitor on the allegations against the plaintiff on the operations of KLMP. The solicitor testified that the defendant and Alice came to see her as the executive director and accountant of KJCF respectively and she saw them as representatives of KJCF. The solicitor also confirmed that the legal opinion was given by her as a result of this meeting and the discussion that took place at this meeting. The solicitor confirmed that her client was KJCF. The solicitor knew that the legal opinion would be seen by the KJCF Board which included the plaintiffs and she knew the plaintiffs were directors of KJCF.

[38] The legal opinion was dated 14 November 1996 and it was addressed to the client KJCF and it was not marked private and confidential. The solicitor faxed the legal opinion to the defendant. The solicitor agreed that the legal opinion has accused the plaintiffs of using KLMP as a vehicle to siphon substantial sums of money from KJCF. The solicitor also agreed that the conduct of the directors is a matter of interest to the shareholders of the company and the public. When the defendant received the legal opinion he read it. He then wrote in his own hand writing the words "Alice, Tunku 14.11" and initialed it on the top right hand corner of the first page of the legal opinion. He then faxed the legal opinion to Yap. He also forwarded the legal opinion to Tunku. He did not inform Yap and Tunku that the legal opinion was confidential and that it should not be circulated to others.

[39] Yap called the plaintiffs for a meeting which was held on 27 November 1996 in connection with KLMP. Yap told the first plaintiff that it was not an official meeting. Yap confirmed that he did not obtain the approval or consent of the KJCF Board or Audit Committee to convene this meeting or even to discuss the legal opinion. Present at this meeting were the plaintiffs, Mr Ng Meng Lee ("Ng") and Dato' Siva ("Siva"), Mr Peter Raj ("Peter"), Mr Yap and Chew. At this meeting Yap gave the legal

A opinion to the first plaintiff who read it. Chew then instructed the first plaintiff to circulate the legal opinion for all others present at the meeting to read it. Hence all present at the meeting read the legal opinion and a discussion on the legal opinion took place. Both Yap and Chew informed the plaintiffs that the legal opinion
B was given to them by the defendant. No one ever requested for the legal opinion to be returned.

[40] Chew testified that the first plaintiff gave him a valid explanation at the meeting held on 27 November 1996 and he
C was satisfied that there was no illegal siphoning of funds by the plaintiffs (p. 289 of Appeal Record).

[41] Chew then arranged for the plaintiffs to meet Tunku on 4 December 1996 at Wisma Antah. At this meeting the plaintiffs,
D Ng, Chew, Yap and Puan Misslee Harian, the legal advisor of Antah ("Misslee") were present. Misslee was a full time employee of Antah and was not employed by KJCF. At this meeting Tunku read loudly the legal opinion and subsequently requested the plaintiffs to resign. The plaintiffs refused to resign.

E **[42]** On 19 December 1996 Tunku invited the first plaintiff for a lunch meeting and again requested the plaintiffs to retire from the KJCF Board. The plaintiffs refused.

[43] At about 10am on 17 January 1997 Tunku telephoned the
F first plaintiff and requested the plaintiffs to resign by 3pm on the same day failing which the plaintiffs will be removed at the KJCF Board meeting to be held on the same day.

[44] A meeting of the KJCF Board took place on 17 January
G 1997. At this meeting the legal opinion was circulated and published to each and every member of the board including the plaintiffs and the defendant on the instructions of Tunku. A discussion on the legal opinion took place. At the end of the meeting the legal opinion was collected by the secretary.

H **[45]** The KJCF Audit Committee held its meeting on 25 September 1996. The minutes of this meeting were duly confirmed and approved by the Audit Committee at the subsequent meeting held on 28 March 1997. Tunku as chairman of the meeting had approved and signed the minutes as a correct record. However six
I months after the meeting there was a proposal to amend the minutes with the following statement that "Furthermore, it was felt that perhaps it is advisable to consult with the company's lawyers

on this matter." The first plaintiff wrote to the company secretary of KJCF on 15 May 1997 and copied to the directors of KJCF and strongly objected to this belated amendment as they contended that this amendment "was concocted as an afterthought in order to attempt to substantiate a defence to the pending defamation suit which was filed by me and Mr See Teow Koon against Dato' Anthony See Teow Guan as the amendment was purportedly made on 28 March 1997 after Dato' Anthony See had filed his defence on 14 March 1997" (at pp. 742 and 743 of Appeal Record).

[46] We have taken pains to set out the above chronology and sequence of events and facts in order to appreciate the factual matrix of this case. From the above fact pattern it is very clear to us that the communications between the defendant and the solicitor was not intended to be confidential. Both the defendant and the solicitor knew in advance that the legal opinion would be circulated and published to the KJCF Board and Audit Committee members including the plaintiffs and the external auditors of KJCF. The defendant caused the publication of the legal opinion to the external auditors in the knowledge that the auditors will furnish the legal opinion to the plaintiffs and those present at the meeting. It was the natural and probable consequence of the defendant's publication of the legal opinion. There was no element of secrecy or confidentiality when Yap and Chew distributed and published the legal opinion to the plaintiffs and all those present at the meeting on 27 November 1996.

[47] We observe that the meetings held on 22 October 1996, 27 November 1996, 4 December 1996, and 19 December 1996 were all unofficial meetings held without the knowledge of the KJCF Board and Audit Committee. There were no notices for the said meetings and there were no official minutes.

[48] At the meeting held on 4 December 1996 at Wisma Antah there was no element of secrecy or confidentiality either. Therefore the decision and finding of the learned trial judge below that "the evidence point to great confidentiality and the need of secrecy according to the facts as exposed" was plainly wrong and unsustainable in law and in fact. This is a serious misdirection that warrants our appellate interference (see *Asmore v. Corp of Lloyds* [1992] 2 All ER 480 at 493).

[49] The trial judge erroneously held that once the legal opinion was privileged, it would remain so forever, even if it was published to third parties when he held:

> On the last point, Dato' Lingam submitted that since the plaintiffs were given the legal opinion because they have an interest therein, such privilege is removed. I cannot accept this contention for **"once privileged it will always privilege"** – See Dato' Au Ba Chi's case. It does not matter whether the subject matter concerns the plaintiffs or they obtained it from whom.

[50] We agree with the plaintiffs' counsel that the trial judge failed to appreciate that confidentiality is a characteristic which can be lost. In *Legal Profession Privilege in Australia* by Dr. Ronald J Desiatnik at p. 22 it is stated that:

> Confidentiality, however, is a characteristic which can be lost. The increasing ease with which it can be lost identifies it, not merely as a limit to the application of the doctrine, but as a means whereby that application decreases. 'The moment confidence ceases', declared Lord Eldon, 'privilege ceases'.

[51] On the facts of this case we hold that when the defendant wrote in his own handwriting, the words Alice Tunku N. and dated it 14/11, and initialed on the legal opinion and subsequently published it to other persons it constituted an express consent and waiver of privilege. All that *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1989] 3 MLJ 445 established was that (at p. 447 and 448):

> Such consent could have been endorsed in the document itself, or given separately in writing to the effect that they consented to the document being released to the first plaintiff.

[52] The conduct of the defendant in expressly waiving the privilege by disclosing and publishing the legal opinion to third parties is illustrative of the principle of express waiver. In *Legal Professional Privilege in Australia* by Dr Ronald J Desiatnik at pp. 102 and 103 it is stated as follows:

> Equally, the statement that 'a litigant can of course waive his privilege directly through intentionally disclosing protected material', aptly describes an express waiver. Thus it is that the High Court, in *Giannarelli v. Wraith (No. 2)*, after pointing out that 'a party cannot be compelled to waive his or her privilege', was untroubled in ruling that a party who produces privileged documents to a taxing officer waives the privilege. Similarly, in

> *Trade Practices Commission v. Ampol Petroleum (Victoria) Pty Ltd*, Heerey J easily concluded that any legal professional privilege that existed over documents in the possession of the Commission was expressly waived when the Commission handed over those very documents to persons who owed it no obligation of confidentiality, stating, in so deciding, somewhat curtly:
>
> Short of Mr. Holm saying 'We hereby waive privilege', it is hard to see what more could have been done to establish wavier.
>
> Other methods of intentional disclosure are reading out a privileged document in open court or tendering a privileged communication at an interlocutory proceeding in an action or in other proceedings in which the same party was a litigant, such as in the case of *Manly Municipal Council v. Ward*, where Powell JA justified that conclusion by noting that 'the actions of the party in question have allowed the material contained in the document to become *publici juris*.'
>
> In short, by overt acts such as these 'the privilege is effectively lost. It cannot be retrieved', as in each case legal professional privilege has been expressly waived by use 'of documents in a manner which is incompatible with the retention of confidentiality'.

[53] The finding of the learned judge that there was no express consent to waive the privilege is plainly wrong.

[54] In this case the plaintiffs were given a copy of the legal opinion at the meeting held with the external auditors on 27 November 1996. The plaintiffs never requested for the legal opinion. They did not obtain the legal opinion by any devious means or by theft. In the case of *Daya Shankar Dubey v. Subhas Kumar* [1992] Cri LJ 319 at p. 323 it was held that:

> The first point can be rejected straight-way as the privilege can be claimed only when the Advocate or the clients are asked to disclose any professional communication between them. Such a privilege, however, cannot be claimed in respect of a document which had already come in possession of the opposite party and has been filed on record.

[55] Since the plaintiffs were given a legal opinion by the external auditors who received it from the defendant and the plaintiffs have come into legal possession of the legal opinion, no privilege can be claimed in respect of the legal opinion.

[56] In this case the legal opinion was also exhibited under exh. "STC2" of the plaintiffs affidavit in reply to the defendant's application for striking out and was read by both the plaintiffs' and the defendant's counsel in the striking out proceedings before the registrar and on appeal before the very same judge, who thereafter also heard the case. (See pp. 224 to 226, 385 to 397 and 705 to 707 of appeal record). The trial judge had on 29 July 1998 dismissed the defendant's appeal against the decision of the registrar dismissing the defendant's SIC application to strike off the plaintiffs' writ of summons and statement of claim. (See pp. 46 to 49 of Appeal Record.) The defendant did not appeal against the decision of the learned judge.

[57] In the Supreme Court case of *Jaafar bin Shaari v. Tan Lip Eng* [1997] 4 CLJ 509 at p. 521, Peh Swee Chin SCJ held as follows:

> Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

[58] Further, in *Derby & Co Ltd and Others v. Weldon and Others (No 10)* [1991] 2 All ER 908 under headnote 1 at p. 909 it was held that:

> Where a party deployed material in court in an interlocutory application, privilege that could otherwise be claimed in relation to that and associated material would be treated as waived altogether, with the result that the party could not then assert privilege for the same material at the subsequent trial … .

[59] As the legal opinion was exhibited in the affidavit and deployed in court in the striking out application by the defendant and was also read out in open court by counsel for both parties the privilege was clearly waived altogether.

List Of Documents

[60] The plaintiffs had in grounds B2 to B4 of the memorandum of appeal contended that both the plaintiffs and the defendant had disclosed the legal opinion in their respective list of documents and

therefore the authenticity of the copy the legal opinion disclosed by the defendant has been established by the operation of O. 27 r. 4 of the Rules of the High Court 1980 and the defendant is deemed to admit that the copy disclosed to him is a true copy, and that the original was signed as it purports to have been.

[61] The plaintiffs counsel submitted that the defendant had by placing the legal opinion under Part 1 of Schedule 1 of the List of Documents, under item 10, the defendant has in fact chosen to waive the privilege attached to the legal document. Therefore the legal opinion is admissible at the trial.

[62] The defendant counsel submitted that the defendant had specifically stated in para. 2 of the List of Documents that the defendant objects to the production of the documents enumerated in Part 1 of the said Schedule 1 Nos 1 to 10 on the grounds set out in the defence filed herein and in particular para. 9 thereof.

[63] The List of Documents affirmed by the defendant solicitors is found at pp. 1373 to 1383 Appeal Record Bahagian C and the List of Documents affirmed by the plaintiffs solicitors is found at pp. 1340 to 1372.

[64] Under O. 24 r. 5(1) the List of Documents must be in Form 40. The plaintiffs had disclosed the legal opinion in Part 1 of Schedule 1 under item No 1. The defendant had disclosed the legal opinion in Part 1 of Schedule 1 under item No 10.

[65] It is clear that all documents in Part 1 of Schedule 1 are documents for which privilege is not claimed. In the Notes on Malaysian Court Practice (Malayan Law Journal [2003]), under O. 24 r. 5(1) Rules of the High Court 1980 at p. 1105 it is stated that:

> ... In Schedule 1 Part 1, the party making the discovery must set out the documents relating to the matters in question in the action which he has in his possession, custody or power, and is willing to produce, and for which he claims no privilege ...

[66] In the *English Supreme Court Practice 1999 Edition* it is stated at p. 454 para 24/5/2 under O. 24 r. 5 as follows:

> The list does not contain any documents save those relating to the matters in question, and accordingly, the Court will assume against the party making the list, at least until the contrary is shown, that the documents in the list are all relevant and liable to

production. There are two Schedules to the list. In Schedule 1 is the list of the documents which the party has in his possession, custody or power. It is divided into two Parts: Part I consists of the documents for which he claims no privilege; Part II of the documents for which he claims privilege from production. Sched. 2 comprises the documents which he had, but has not now, in his possession, custody or power.

[67] In our judgment since the defendant had placed the legal opinion under Part 1 of Schedule 1 under item No 10, the defendant has expressly consented to produce the document and for which he claims no privilege. Therefore the defendant had waived the privilege to the legal opinion and it is admissible in evidence at the trial.

[68] In our judgment the facts of this case clearly demonstrate that the communications between the defendant and the solicitor was not intended to be confidential. In all the circumstances of the case and for the grounds given above we hold that the defendant had waived the confidentiality and the privilege attached to the legal opinion. The decision of the learned trial judge was plainly wrong and was a serious misdirection that warrants our appellate interference. We therefore allow this appeal with costs here and below to be paid to the appellant and set aside the decision of the trial judge. We hold that in this case on the facts the communications between the defendant and the solicitor is not protected by privilege under s. 126 of the Evidence Act 1950. We order that the trial be continued in the court below at an early date to be fixed.